DePaul University
UNIVERSITY LIBRARIES

DePaul Journal of Art, Technology & Intellectual Property Law

Volume 6
Issue 1 *Fall 1995*

Article 18

Ameritech Corp. v. United States, 867 F. Supp. 721 (N.D. Ill. 1994)

Radoje A. Vujovic

Follow this and additional works at: https://via.library.depaul.edu/jatip

Recommended Citation

Radoje A. Vujovic, *Ameritech Corp. v. United States, 867 F. Supp. 721 (N.D. Ill. 1994)*, 6 DePaul J. Art, Tech. & Intell. Prop. L. 167 (1995)
Available at: https://via.library.depaul.edu/jatip/vol6/iss1/18

This Case Summaries is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Art, Technology & Intellectual Property Law by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

Ameritech Corp. v. United States,

867 F. SUPP. 721 (N.D. ILL. 1994).

INTRODUCTION

Ameritech Corporation ("Ameritech"), a regional telephone company, joined by local telephone company Illinois Bell, brought suit in the United States District Court for the Northern District of Illinois, against the federal government, the Federal Communications Commission ("FCC"), and the United States Attorney General (collectively "the Government"). The plaintiffs challenged a provision of the Cable Communications Policy Act of 1984, which prohibits telephone companies from providing cable television service directly to customers within the companies' local service area. Both parties filed cross-motions for summary judgment. The district court granted summary judgment in favor of the plaintiffs holding that the challenged provision infringed upon the companies' right of free speech under the First Amendment.

FACTS

Plaintiff Ameritech is the parent company of plaintiffs Illinois Bell and Michigan Bell. The three companies provide local and regional telephone service to millions of customers. In 1970, the FCC, concerned that a monopoly situation might arise, issued a ruling which prohibited telephone companies from providing cable television programming to customers in their local service area. The 1970 FCC rule was codified by Congress in section 533(b) of the Cable Communications Policy Act of 1984 (the "1984 Cable Act").[1] The Act specifically prohibits telephone companies from providing "video programming," which is defined as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station."[2] Although section 533(b) of the Act does not bar telephone companies from providing either video programming to customers outside their local service areas or other visual informa-

1. 47 U.S.C. § 533(b)(1) and (2)(1994), which provides:
(1) It shall be unlawful for any common carrier . . . to provide video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier. (2) It shall be unlawful for any common carrier . . . to provide channels of communication or pole line conduit space, or other rental arrangements, to any entity which is directly or indirectly owned by, operated by, controlled by, or under common control with such common carrier, if such facilities or arrangements are to be used for, or in connection with, the provision of video programming directly to subscribers in the telephone service area of the common carrier.

2. 47 U.S.C. § 522(19) (1994).

tion services not considered "video programming," the plaintiffs contended that section 533(b) was an impermissible restriction on speech in violation of the First Amendment.

Concern has been growing in recent years about monopolistic practices within the cable television industry. Most cable television systems face no local competition; consequently, most subscribers have no opportunity to choose between competing cable systems. Congress attempted to address these concerns by enacting the Cable Television Consumer Protection Act of 1992 (the "1992 Cable Act"), over a presidential veto. The 1992 Cable Act prohibits exclusive local franchises, regulates or limits the rates cable providers may charge their customers, and prohibits cable providers from owning "wireless" cable systems.[3] During the debate preceding the enactment of the 1992 Cable Act, the FCC and the United States Department of Justice ("DOJ") supported allowing telephone companies to compete in the cable marketplace. Nevertheless, the 1992 Cable Act left section 533(b) intact, and the local cable market remained closed to telephone companies.

The plaintiffs alleged that although section 533(b) may have served the Government's asserted interests ten years ago, the asserted interests are no longer served by the statute, thereby infringing upon the plaintiffs' First Amendment rights. The Government argued that section 533(b) furthers a legitimate governmental interest and is, therefore, constitutional. Both parties moved for summary judgment.

LEGAL ANALYSIS

Since both parties agreed that section 533(b) of the 1984 Cable Act constitutes a restriction on the plaintiffs' speech, the district court first had to determine the proper level of scrutiny under which section 533(b) should be analyzed. In cases involving restrictions on speech, courts have applied three levels of scrutiny. Using the "rational basis" standard, the least rigorous test, courts uphold regulations affecting broadcast television if the regulations are "'a reasonable means' of promoting a 'permissible' public interest."[4] When the government seeks to regulate the time, place or manner of speech, or governmental regulation of conduct has an incidental effect on speech, courts apply an "intermediate" or "heightened" scrutiny analysis.[5] "Content-based" restrictions on speech are presumed invalid and will be upheld only if "necessary to serve a compelling state interest."[6] These types of restrictions merit the highest level of scrutiny, known as "strict scrutiny."

Although the parties to this action agreed that section 533(b) of the 1984 Cable Act imposes restrictions on the telephone companies' freedom of speech, they disagreed as to which level of scrutiny should be applied. The Government

---

3. *See* 47 U.S.C. §§ 532(c), 533(a)(2), 533(f), 543 (1994).
4. FCC v. National Citizens Comm. for Broadcasting, 436 U.S. 775, 796 (1978).
5. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).
6. R.A.V. v. City of St. Paul, 505 U.S. 377, 403 (1992) (White, J., concurring).

urged the court to apply the "rational basis" standard of review traditionally used in cases involving over-the-air broadcasting regulations. The plaintiffs argued that section 533(b) should be subject to strict scrutiny because it is content-based and discriminates against a discrete group of speakers, i.e., telephone companies.

The court rejected the arguments of both parties, favoring instead the intermediate scrutiny approach used by the United States Supreme Court in *Turner Broadcasting System, Inc. v. FCC.*[7] In *Turner Broadcasting*, the Supreme Court found the "must-carry" provisions of the 1992 Cable Act, which require cable companies to include local television stations on their cable systems, constitutional.[8] The *Turner* court, in applying intermediate scrutiny, reasoned that while broadcasting restrictions on traditional over-the-air broadcasters might appropriately be subject to rational basis review due to the broadcast spectrum's scarcity of frequencies, such considerations do not apply to cable television, because there is "no practical limitation on the number of speakers who may use the cable medium."[9] The district court in the instant case ruled that just as the 1992 Cable Act's "must-carry" provisions placed a special burden on cable operators, section 533(b) likewise burdens telephone companies by barring them from providing video programming to their customers, therefore, intermediate scrutiny is the appropriate standard.

The court rejected the plaintiffs' claim that section 533(b) is a content-based restriction requiring strict scrutiny. The plaintiffs argued that the distinction in section 533(b) between video programming and other types of video service that telephone companies are allowed to carry is content-based. In determining whether or not a restriction is content-based, a court must look to whether the restriction favors some speech over other speech on the basis of the ideas or views expressed.[10] The court stated that it could not see how ideas or views fit into the distinction between the forbidden video programming and the permissible interactive programming. The court reasoned that the provision prohibits any video programming regardless of content and is, therefore, content-neutral. The plaintiffs' alternative argument that section 533(b) should trigger a strict scrutiny analysis because it targets a small number of speakers was also rejected by the court, which held that fact by itself was insufficient to justify strict scrutiny.

The court next addressed the issue of whether section 533(b) would pass constitutional muster under intermediate scrutiny analysis. Under intermediate scrutiny, the restriction may be upheld if it satisfies a three-part test: (1) it is content-neutral; (2) it is narrowly tailored to serve a significant governmental interest; and (3) it leaves open ample alternative channels for communication of the information.[11]

Having already determined that section 533(b) is content-neutral, the court

---

7. 114 S. Ct. 2445 (1994).
8. *Id.*
9. *Id.* at 2473.
10. *Id.*
11. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984).

next considered whether the statute was narrowly tailored to serve a significant governmental interest. Narrow tailoring requires only that the regulation promote a substantial government interest that would be achieved less effectively without the regulation.[12] Although the government need not use the least speech-restrictive means to advance its interest, the means chosen cannot be more speech-restrictive than is necessary.[13] The court also stressed the importance of evaluating the statute with reference to conditions as they exist today. When the constitutionality of a statute is based upon a particular set of facts, that constitutionality "may be challenged by showing to the court that those facts have ceased to exist."[14] The court reasoned that although section 533(b) may have passed constitutional muster at the time it was enacted, a change in market conditions since that time may have rendered the statute a greater burden than necessary to promote the goals of competitiveness and diversity of ownership in the business of cable television.

The court considered the key issue in the case to be whether section 533(b) placed a greater than necessary burden on protected speech. The court noted that the FCC and DOJ, two federal agencies responsible for formulating telecommunications and antitrust policies, agreed that section 533(b) does not promote competition and diversity in the cable industry, and that the statute may actually be counterproductive. Citing a lack of convincing evidence that other current methods of regulating anti-competitive behavior would be ineffective, the court held that the Government had not met its burden of showing that the statute was narrowly tailored to promote competition and diversity of ownership in cable television. Accordingly, the court found that section 533(b) imposed a greater than necessary burden on the telephone companies' speech, and the second prong of the three-part intermediate scrutiny analysis was not met.

Although the court need not have addressed the third part of the intermediate scrutiny analysis, i.e., whether the statute leaves open ample alternative channels of communication, it nevertheless did. The Government argued that the plaintiffs were free to provide video programming to customers outside their local service areas or alternatively through independent media outlets. The plaintiffs countered, and the court agreed, that the Government's reasoning on this issue "is akin to telling the Chicago Tribune that it may distribute a newspaper everywhere but in Chicago, or that its ability to communicate is not significantly curtailed by its having to publish its news stories in other publications."[15] For the foregoing reasons, the court granted the summary judgment motion in favor of the plaintiffs.

12. *Turner Broadcasting*, 114 S. Ct. at 2469; *Ward*, 491 U.S. at 799.

13. *Ward*, 491 U.S. at 799-800.

14. United States v. Carolene Prods. Co., 304 U.S. 144, 153 (1938)(citing Chastleton Corp. v. Sinclair, 264 U.S. 543 (1924)).

15. Ameritech Corp. v. United States, 867 F. Supp. 721, 736 (N.D. Ill. 1994).

CONCLUSION

In summary, the Cable Communications Policy Act of 1984 provision which prohibits telephone companies from providing cable television programming directly to customers within their local service area does not pass constitutional muster under the First Amendment. In applying the intermediate standard of review, the court found that the Government had failed to meet its burden of showing that the statute was narrowly tailored to promote competition and diversity of ownership in cable television. Consequently, the court found that the challenged statute infringed on the plaintiffs' First Amendment right of free speech. The plaintiffs' motions for summary judgment and declaratory judgment were granted, and the defendants were permanently enjoined from enforcing section 533(b) against the plaintiff telephone companies in their respective service areas.

Radoje A. Vujovic